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No. 83-2163

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GARTER-BARE COMPANY,
a limited partnership,
and KNUT L. BJORN-LARSEN,
Petitioners,

vs.

MUNSINGWEAR, INC.,
a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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Dated: October 12, 1984

BEST AVAILABLE COPY

STATEMENT PURSUANT TO SUPREME COURT RULE 28.

Munsingwear, Inc. has no parent, subsidiary or affiliated corporations except The Grand Penguin International Co., a domestic international sales corporation, a wholly owned subsidiary.

RESTATEMENT OF QUESTIONS PRESENTED

1. Did the Ninth Circuit's affirmance of the District Court's alternative order granting Respondent a new trial on Petitioners' California law fraud claim deprive Petitioners of their Seventh Amendment jury trial rights?
2. Did the Ninth Circuit's affirmance of the District Court's order granting Respondent judgment notwithstanding the jury's special verdict finding that Petitioner Larsen's '748 single layer girdle patent was "valid", on the ground of obviousness:
   (a) deprive Petitioner Larsen of his Seventh Amendment jury trial right?
   (b) produce a result in conflict with the prevailing law of the United

States Court of Appeals for the Federal Circuit requiring correction by this Court?

(c) misapply this Court's ruling in Graham v. John Deere Co., 383 U.S. 1, 15 L.Ed. 2d 545 (1966), insofar as the weight and deference to be given to the jury's special verdict finding that Petitioner Larsen's '748 single layer girdle patent was "valid"?

3. Should this Court exercise its power of supervision over the federal judiciary, make an "independent determination of the law of this case consistent with the Federal Circuit's recent pronouncements" (Pet. at 54), and mandate a retrial of Petitioners' patent infringement and fraud claims?

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BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Memorandum and Order dated December 15, 1981 (with order amending dated February 12, 1982), of the United States District Court, Central District of

California (unreported), is reproduced in Petitioners' Appendix (App. 77-111). The two-to-one panel decision dated January 13, 1984, of the United States Court of Appeals for the Ninth Circuit is reported at 723 F.2d 707, and reproduced in Petitioners' Appendix (App. 1-71).

JURISDICTION

See Petition at 2-3 for jurisdictional ground asserted.

CONSTITUTIONAL PROVISIONS INVOLVED

See Petition at 3.

STATEMENT OF THE CASE

Facts pertinent to this proceeding are set forth in Garter-Bare Co. v. Munsingwear, Inc., 650 F.2d 975 (9th Cir. 1980) ("Garter-Bare I"), and Garter-Bare Co. v. Munsingwear, Inc., 723 F.2d 707 (9th Cir. 1984) ("Garter-Bare II").

This action involves a garment adapted to support women's stockings without the use of garters, a "garterless girdle." See Garter-Bare I, 650 F.2d at 976. Petitioner Garter-Bare Co. ("Garter-Bare") and Respondent ("Munsingwear") entered into an agreement ("Agreement") in July, 1965, the subject of which was Petitioner Larsen's ("Larsen") then unpatented idea for a double layer girdle. The purpose of the Agreement was to determine whether that idea, for which Larsen's double layer girdle patent application was

then pending, could be developed into a commercially saleable product. After two and one-half years of research and development (during which Garter-Bare was fully compensated pursuant to the Agreement), Munsingwear concluded that Larsen's double layer girdle concept could not be developed into a commercially saleable product. Indeed, it never has been by anyone.

The Agreement expired on January 1, 1968, and a $3,000 contract dispute arose over Munsingwear's royalty payment obligation to Garter-Bare. In late 1968, Munsingwear made and began marketing a single layer garterless girdle. Although Munsingwear obtained a patent on that garment in early 1970, Munsingwear determined that its patent was invalid, and subsequently dedicated it to the public. Larsen also had obtained a patent on a single layer

girdle in late 1969 ("'748 patent"), some months after the Agreement had expired.

On January 20, 1972, Petitioners filed their original complaint in this action. In their Second Amended Complaint, Petitioners alleged that Munsingwear (1) breached the Agreement; (2) infringed Larsen's '748 patent; (3) misappropriated their trade secrets; (4) defrauded them; and (5) tortiously interfered with their prospective business advantage.

Munsingwear denied all of Petitioners' material allegations, raised affirmative defenses, including statutes of limitations, and counterclaimed seeking a declaration of invalidity and non-infringement of Larsen's '748 patent.

Upon trial, the jury awarded Petitioners in excess of $31,000,000. The District Court

set aside that monstrous verdict. (A "sum equal to nearly 80% of Munsingwear's 1979 total net worth". Garter-Bare II, 723 F.2d at 717 (dissent)). See Garter-Bare II, 723 F.2d at 709. It concluded that Larsen's '748 patent was invalid as a matter of law for obviousness under 35 U.S.C. § 103. (App. at 87-92).

The Ninth Circuit, in a two-to-one panel decision, affirmed the District Court's grants of judgment n.o.v. on Petitioners' patent and contract claims, reversed the District Court's grants of judgment n.o.v. on Petitioners' trade secret misappropriation and tortious interference with prospective business advantage claims (but affirmed the District Court's alternative orders granting Munsingwear a new trial on those claims), and reversed the District Court's grant of summary judgment that Petitioners' California law

fraud claim was time-barred as a matter of law (but affirmed the District Court's order granting Munsingwear a new trial on that claim). See Garter-Bare II, 723 F.2d at 716-17.

Both Petitioners and Munsingwear sought relief from the Ninth Circuit's panel decision, but all relief sought was denied. (App. at 72-76).

SUMMARY OF ARGUMENT

Petitioners' contentions that the grant of a new trial on their California law fraud claim and the grant of judgment n.o.v. that Larsen's '748 patent is invalid for obviousness deprived them of their Seventh Amendment jury trial rights are contrary to established law, totally lacking in merit, and present no issue worthy of this Court's discretionary review.

No sufficient conflict exists between the Federal Circuit's and Ninth Circuit's patent law decisions to warrant this Court's attention. Any perceived differences appear more semantical than substantive, and, measured by either court's approach, Petitioner Larsen's '748 patent is invalid for obviousness as a matter of law. Moreover, the judgment n.o.v. invalidating Larsen's '748 patent for obviousness does not constitute

a misapplication by the District Court and the Ninth Circuit of this Court's decision in Graham v. John Deere Co. To the contrary, the District Court's analysis of two pertinent prior art patents is precisely what this Court mandated in Graham v. John Deere Co., and that analysis was correctly upheld by the Ninth Circuit upon application of the appropriate standard of appellate review. There is no indication that this Court's discretionary review will lead to new or valuable precedent.

Finally, Petitioner's appeal to the exercise of this Court's supervisory powers is patently frivolous and should be rejected. Because Petitioners have failed to demonstrate "special and important reasons" for granting a writ of certiorari (Sup. Ct. R. 17.1), the Petition in all respects should be denied.

REASONS FOR DENYING THE WRIT

I.

Petitioners' Seventh Amendment Jury Trial Contention Presents No Basis For This Court's Discretionary Review

Petitioners assert that the District Court's order granting Munsingwear a new trial on Petitioners' California law fraud claim was error, and that the affirmance of that order by the Ninth Circuit deprived Petitioners of their Seventh Amendment jury trial rights. (Pet. at 13-24). The District Court concluded that, in reaching its $15,000,000 fraud verdict, the jury may have been influenced "by the belief that the patent [Larsen's '748 invalid patent] was valid and the trade secrets were misappropriated."

(App. at 98).[1] It also concluded, as an alternative ground for granting Munsingwear a new trial, that "the jury's findings on the statute of limitations issue is contrary to the great weight of the evidence." (App. at 101).

The District Court had the power to set aside the jury's fraud verdict and grant Munsingwear a new

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1. The interrelationship between Petitioners' patent and fraud claims was noted by the Ninth Circuit on the first appeal, Garter-Bare I, 650 F.2d at 982: "... as to these patent issues, with fraud claims so closely intertwined, ..." The plain fact is that, absent a valid patent covering a commercially marketable product, Petitioners had nothing of value to license to anyone. The contractual relationship between the parties, out of which this litigation arises, expressly contemplated a valid patent covering a commercially marketable product. See Garter-Bare I, 650 F.2d at 976-77.

trial. Its ruling was based upon two alternative grounds against the backdrop of an obviously "runaway" verdict lacking evidentiary support. The action of a district court "in granting or refusing to grant" a motion for a new trial "cannot be assigned for error here." Pittsburgh, C. & St. L. Ry. Co. v. Heck, 102 U.S. 120, 26 L.Ed. 58, 59 (1880); see 58 Am. Jur. 2d New Trial § 3, at 184 (1971); 6A J. Moore, J. Lucas & G. Grotheer, Jr., Moore's Federal Practice ¶¶ 59.04, 59.05 (2d ed. 1984).

Petitioners' contention that they were deprived of their Seventh Amendment jury trial rights is contrary to established law, and presents no issue worthy of this Court's discretionary review.

II.

Petitioners' Patent Law Contentions Present No Basis For This Court's Discretionary Review

A. Petitioner Larsen's Seventh Amendment Jury Trial Contention Is Without Merit.

The District Court's grant of judgment n.o.v. that Larsen's '748 patent is invalid for obviousness, and the Ninth Circuit's affirmance thereof, do not constitute violations of Larsen's Seventh Amendment jury trial right. See Galloway v. United States, 319 U.S. 372, 87 L.Ed. 1458 (1943) (directed verdict); Annot.: Judgment Notwithstanding Verdict, 69 A.L.R.2d 449, 470-72 (1960); 9 C. Wright & A. Miller, Federal Practice & Procedure § 2522 (1971).

Whether or not a patent is invalid ultimately is a question of law for the court to decide. Sakraida v. Ag Pro, Inc., 425 U.S. 273, 280, 47 L.Ed. 2d 784, 790

(1976); Graham v. John Deere Co., 383 U.S. 1, 17, 15 L.Ed. 2d 545, 556 (1966). Accord Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d 1506, 1515 (Fed. Cir. 1984), cert. denied, 53 U.S.L.W. 3225 (Oct. 2, 1984); Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1547 (Fed. Cir. 1984); Sarkisian v. Winn-Proof Corp., 688 F.2d 647, 651 (9th Cir. en banc 1982), cert. denied sub nom. Carsonite International Corp. v. Carson Mfg. Co., _____ U.S. _____, 75 L.Ed. 2d 930 (1983) (all involving "obviousness" under 35 U.S.C. § 103).

Petitioners rely upon Connell v. Sears, Roebuck & Co., supra. (Pet. at 33, 42). In Connell, the Federal Circuit affirmed a district court's grant of judgment n.o.v., contrary to the jury's specific finding of validity based upon nonobviousness, and observed:

> "The jury's legal conclusion disregarded (and cannot stand against a contrary conclusion resting on) prior art not considered in the PTO and far more pertinent than that the PTO considered." (722 F.2d at 1550).

Connell also observed:

> "... the right to trial by jury in a civil case carries with it a number of procedural safeguards insuring ... against an improper outcome that might result from a posited unruly or 'rogue elephant' jury." (722 F.2d at 1546).

In granting Munsingwear judgment n.o.v. that Larsen's '748 patent was invalid for obviousness, the District Court did no less than did the district court in Connell, grounding its ruling principally upon two pertinent prior art patents, "neither of which was before the patent examiner, ..." (App. at 89-92). After correctly noting that Petitioners "appropriately concede that obviousness

is a question of law for the court" (723 F.2d at 711), the Ninth Circuit panel, in accord with its own prior decisions and Fed. R. Civ. P. 52(a),[2] affirmed because it could "not say on this record that the district court judge's conclusions were clearly erroneous." (App. at 18-19). The Federal Circuit in Connell did the same thing, noting the absence of any Seventh Amendment problems. (722 F.2d at 1546).

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2. Petitioners correctly acknowledge that "the Ninth Circuit was not bound by decisions of the Federal Circuit, ..." (Pet. at 53). Under similar circumstances (affirming a district court's invalidation of a patent for obviousness), the Federal Circuit also has applied Fed. R. Civ. P. 52(a) as the governing appellate review standard. See Stratoflex, Inc. v. Areoquip Corp., 713 F.2d 1530, 1535 (Fed. Cir. 1983).

Larsen's contention that he was deprived of his Seventh Amendment jury trial right is contrary to established law, and presents no issue worthy of this Court's discretionary review.

B. No Sufficient Conflicts Exist Between The Federal Circuit's And Ninth Circuit's Patent Law Decisions To Merit This Court's Discretionary Review.

Larsen's '748 patent (App. Pat. Docs. A-38-40) involves a garment adapted to support women's stockings without the use of garters, a "garterless girdle." See Garter-Bare I, 650 F.2d at 976. It issued November 18, 1969, and if not invalid, would expire November 18, 1986, in a little over two years.

The United States Court of Appeals for the Federal Circuit was created by 28 U.S.C. § 41 effective October 1, 1982. It has exclusive jurisdiction (28 U.S.C. § 1295) to

review appeals from final decisions of a district court if that court's jurisdiction was based, in whole or in part, on 28 U.S.C. § 1338.

The patent law decisions of the Federal Circuit have evolved over just the last two years. Those decisions generally accord with (and sometimes rely upon) decisions of the Ninth Circuit.[3] The patent law decisions of the Federal Circuit and Ninth Circuit as to (i) the three basic fact findings bearing upon nonobviousness under Graham v. John Deere Co., 383 U.S. 1, 15 L.Ed. 2d 545

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3. See Perkin-Elmer Corp. v. Computervision Corp., 732 F.2d 888, 893 (Fed. Cir. 1984), cert. denied, 53 U.S.L.W. 3226 (Oct. 2, 1984), citing Velo-Bind, Inc. v. Minnesota Mining & Mfg. Co., 647 F.2d 965, 971 (9th Cir. 1981).

(1966),[4] (ii) the standards to be applied in granting or denying judgment n.o.v.,[5] and (iii) the appellate standard by which the grant or denial of judgment n.o.v. should be reviewed,[6] are articulated without material difference.

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4. Compare Sarkisian v. Winn-Proof Corp., supra, 688 F.2d at 650, and Garter-Bare II, 723 F.2d at 710-11, with Connell v. Sears, Roebuck & Co., supra 722 F.2d at 1547, and Perkin-Elmer Corp. v. Computervision Corp., supra, 732 F.2d at 894.

5. Compare Memorandum and Order dated December 15, 1981 (App. at 92) and Garter-Bare II, 723 F.2d at 710-11, with Connell v. Sears, Roebuck & Co., supra, 722 F.2d at 1546, and Railroad Dynamics, Inc. v. A. Stucki Co., supra, 727 F.2d at 1513.

6. Compare Sarkisian v. Winn-Proof Corp., supra, 688 F.2d at 651, and Garter-Bare II, 723 F.2d at 711, with Connell v. Sears, Roebuck & Co., supra, 722 F.2d at

(Footnote Continued)

In one respect, the patent law decisions of the Federal Circuit and the Ninth Circuit's decision in Sarkisian v. Winn-Proof Corp., supra, have been read to differ. In Sarkisian, the Ninth Circuit en banc, after holding that "the trial court in a jury trial must submit to the jury" the three basic nonobviousness fact findings mandated by Graham v. John Deere Co., supra, (688 F.2d at 651 (emphasis added)), next held:

> "(b) The court may submit the ultimate fact of obviousness to the jury for a nonbinding advisory opinion." (id. (citation omitted and emphasis added)).

In Perkin-Elmer Corp. v. Computervision Corp., supra, 732 F.2d at 895 n.5, the Federal

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(Footnote Continued)
1550. See Velo-Bind, Inc. v. Minnesota Mining & Mfg. Co., supra, 647 F.2d at 970-71.

Circuit criticized Sarkisian, apparently reading out of context the above quoted holding as denigrating the proper role of the jury in a patent jury trial. This reading of Sarkisian by the Federal Circuit, relied upon heavily by Petitioners (Pet. at 28-33), appears at odds with both courts' pronouncements that obviousness is a legal issue for the court to decide.[7] It also appears to disregard both courts' stated preference that the three basic nonobviousness fact findings mandated by Graham v. John Deere Co., supra, be submitted to the jury by separate interrogatories, rather than pursuant to a single

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7. Compare Connell v. Sears, Roebuck & Co., supra, 722 F.2d at 1547, with Sarkisian v. Winn-Proof Corp., supra, 688 F.2d at 651.

omnibus question on the ultimate issue of validity.[8]

In any patent jury trial, a district court following the preferred verdict practice would submit separate verdict questions for the jury to answer on each of the three basic nonobviousness fact findings. Under Sarkisian, a district court "may" also submit "the ultimate fact of obviousness to the jury" (688 F.2d at 651), but if that procedure is adopted, the jury's answer to that ultimate question is simply cumulative of the jury's answers to the three prior sub-questions, which Sarkisian states a district court "must" submit to the jury. (Id.).

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8. See Perkin-Elmer Corp. v. Computervision Corp., supra, 732 F.2d at 893; Connell v. Sears, Roebuck & Co., supra, 722 F.2d at 1547; Sarkisian v. Winn-Proof Corp., supra, 688 F.2d at 650.

Since both the Federal Circuit and Ninth Circuit agree that the ultimate conclusion of obviousness is a legal issue for the court to decide, the weight to be given the jury's answer to the ultimate question, if one is propounded, is of little or no significance in the context of the court's own resolution of that ultimate conclusion. Its task, and the applicable standards for granting or denying judgment n.o.v., are not altered by the jury's answer to the ultimate issue for the court -- is the patent at issue as a matter of law invalid because it is obvious? See White v. Jeffrey Mining Machinery Co., 723 F.2d 1553 (Fed. Cir. 1983), cert. denied, 53 U.S.L.W. 3225 (Oct. 2, 1984) (reversing a district court's refusal to grant judgment n.o.v. that the patent at issue was invalid for obviousness).

The District Court here followed the practice of submitting

only a single verdict question on validity. In that jury trial context, the Federal Circuit and Ninth Circuit agree that the jury's answer to the single question on validity presumptively brings with it the existence of consistent, but unstated, verdict findings on the three basic nonobviousness issues. The Federal Circuit and Ninth Circuit also agree that those presumed specific findings are to be tested, for judgment n.o.v. and appeal purposes, as if they had been explicitly made. See Perkin-Elmer Corp. v. Computer-vision Corp., supra, 732 F.2d at 893; Connell v. Sears, Roebuck & Co., supra, 722 F.2d at 1547; Sarkisian v. Winn-Proof Corp., supra, 688 F.2d at 650; Velo-Bind, Inc. v. Minnesota Mining & Mfg. Co., supra, 647 F.2d at 971.

A careful examination of what the District Court did in granting Munsingwear judgment n.o.v. that

Larsen's '748 patent was invalid for obviousness produces the conclusion that no different result would have been reached had it explicitly done so according to the five part standard articulated by the Federal Circuit in Connell:

> "Under these guidelines, a court must: (1) consider all the evidence; (2) in a light most favorable to the non-mover; (3) drawing reasonable inferences favorable to the non-mover; (4) without determining credibility of witnesses; and (5) without substituting its choice for that of the jury between conflicting elements in the evidence." (722 F.2d at 1546).

The cornerstones for the District Court's ruling (App. at 87-92) were the teachings of Graham v. John Deere Co., supra, two pertinent prior art patents not cited to the patent examiner (App. at 89-91), and an inescapable admission of Petitioners' own expert witness (App. at 91). That

evidentiary base was more than sufficient under Federal Circuit standards for the grant of judgment n.o.v. against the "factual background of the Larsen patent in light of the teachings of Graham v. John Deere Co., ..." (App. at 92). In Connell, the Federal Circuit affirmed the grant of judgment n.o.v. invalidating a patent for obviousness, directly contrary to the jury's specific finding of validity, based upon "prior art not considered in the PTO and far more pertinent than the PTO considered." (722 F.2d at 1550).[9]

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9. This Court in Graham v. John Deere Co., supra, 383 U.S. at 25-26, 15 L.Ed. 2d at 561, in finding "no nonobvious facets in the '798 arrangement," relied heavily upon a prior art patent which was not before the patent examiner.

Petitioners build upon what appears to be the Federal Circuit's misreading of Sarkisian in Perkin-Elmer Corp., to construct a conflict between the patent law decisions of the Federal Circuit and the Ninth Circuit. (Pet. at 28-34, 55-59). No such conflict exists as to the proper role of a jury in a patent trial, and any perceived differences appear more semantical than substantive. Measured by either court's approach, Petitioner Larsen's '748 patent is invalid for obviousness as a matter of law.[10]

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10. While the District Court's view of the presumption of validity (35 U.S.C. § 282) (App. at 89) differs from that of the Federal Circuit (see Stratoflex, Inc. v. Areoquip Corp., supra, 713 F.2d at 1534), that difference was not material to the propriety of the District Court's grant of judgment n.o.v. invalidating Larsen's '748

(Footnote Continued)

Petitioners' contentions must be measured, in substantial part, against the background of this Court's denial of certiorari in Sarkisian, which is a principal focus of Petitioners' dissatisfaction, and the similarity of results achieved in the Ninth Circuit below and in the Federal Circuit's decision in Connell, both of which were based upon comparable record evidence. Petitioners' contentions present no

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(Footnote Continued)
patent for obviousness. As in Stratoflex, the District Court's determination was not predicated upon the role of the presumption. In both, the courts concluded that the patents at issue were invalid for obviousness based upon Graham v. John Deere Co., supra, and "the legal conclusion of obviousness." (713 F.2d at 1535). The appellate review standard is identical. Compare Stratoflex, Inc. v. Aeroquip Corp., supra, 713 F.2d at 1535, with Garter-Bare II, 723 F.2d at 711.

issue worthy of this Court's discretionary review.

C. There Has Been No Misapplication Of Graham v. John Deere Co. To Justify This Court's Discretionary Review.

Graham v. John Deere Co., supra, focused upon 35 U.S.C. § 103:

> "Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined." (383 U.S. at 17, 15 L.Ed. 2d at 556).

As to "secondary considerations" ("commercial success, long felt but unsolved needs, failure of others, etc., ..."), this Court said they "might be utilized" and "may have relevancy" as "indicia of obviousness or

nonobviousness." (383 U.S. at 17-18, 15 L.Ed. 2d at 556).[11]

Petitioners contend that the Ninth Circuit's affirmance of the District Court's judgment n.o.v. invalidating Larsen's '748 patent

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11. Petitioners complain about the District Court's and the Ninth Circuit's lack of concern over Petitioners' "secondary consideration" evidence. (Pet. at 43-44). Given this Court's explicit precautions that such secondary considerations "might be utilized" and "may have relevance" as "indicia of obviousness or nonobviousness" (383 U.S. at 17-18, 15 L.Ed. 2d at 556 (emphasis added)), that lack of concern was appropriate here where the District Court's conclusion of obviousness based upon two pertinent prior art patents was reached in the District Court's analytical process without any need thereafter to address the less tangible secondary considerations. "But commercial success without invention will not make patentability." Great A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147, 153, 95 L.Ed. 162, 167 (1950).

for obviousness results in an "unwarranted construction" of this Court's Graham v. John Deere Co. decision (Pet. at 48). This can be so, according to Petitioners, only because the District Court, contrary to the jury's finding of validity, concluded as a matter of law that Larsen's claimed invention was obvious, principally by reason of two pertinent prior art patents not before the patent examiner. (App. at 87-92).

The District Court's analysis of those two prior art patents is precisely what this Court mandated in Graham v. John Deere Co., quoted above. Petitioners' true complaint is not that the District Court failed in a proper application of Graham v. John Deere Co. to determine the scope and content of the prior art and the differences between it and claims 1 and 6 of Larsen's '748 patent. Petitioners true complaint is that the jury

found, as a fact, that Larsen's '748 patent was valid, and the District Court reached an opposite conclusion as a matter of law.

If this Court were to accept jurisdiction as Petitioners seek, it would then have to do what it did in Graham v. John Deere Co. and Sakraida v. Ag. Pro. Inc., supra, analyze the two prior art patents and compare them with Larsen's '748 patent. The District Court did just that in reaching its decision, and the Ninth Circuit affirmed upon application of the appropriate standard of appellate review. Unless this Court wishes to re-examine its decision in Graham v. John Deere Co.,[12] something which

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12. If this Court had such a desire, it had pending before it a far more appropriate vehicle, which it declined to utilize. See May v. American Southwest Waterbed

(Footnote Continued)

Petitioners do not suggest by any of their questions presented (Pet. at -i-), no new or valuable precedent will result from this Court's discretionary review.

Munsingwear submits that this Court's review, as Petitioners seek, would produce a result substantially similar to those reached by this Court in Graham v. John Deere Co. and Sakraida (all patents at issue held invalid for obviousness). The evolution of the law bearing upon 35 U.S.C. § 103 would not benefit from yet another decision of this Court holding a patent invalid for obviousness. During the Federal Circuit's two year existence, the number of patent decisions issued by the

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(Footnote Continued)
Distributors, Inc., 715 F.2d 876 (5th Cir. 1983), cert. denied, _____ U.S. _____, 80 L.Ed. 2d 131 (1984).

courts of appeals has dwindled to the point where very few must remain undecided. Should this Court exercise its discretionary review as Petitioners suggest, by the time this Court's decision issues there will be few, if any, patent appeals pending before the courts of appeals, other than the Federal Circuit, for which this Court's decision would be of any precedential value. Munsingwear suggests that this Court's discretionary jurisdiction would be better utilized in reviewing patent decisions of the Federal Circuit which has the on-going responsibility of appellate review of patent decisions of the district courts.

Petitioners' contentions present no issue worthy of this Court's discretionary review.

III.

Petitioners' Appeal To The Exercise Of This Court's Power Of Supervision Is Frivolous

Petitioners contend that this Court exercise its discretionary jurisdiction (Pet. at 48-58) and make "its independent determination of the law of this case consistent with the Federal Circuit's recent pronouncements and return the patent for retrial with the fraud issues ...." (Pet. at 54). This contention is frivolous and presents no issue worthy of this Court's discretionary review.

CONCLUSION

Petitioners have failed to show "special and important reasons" for this Court's discretionary review. Sup. Ct. R. 17.1. See Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 392-93, 67 L.Ed. 712, 714 (1923). The Petition in all respects should be denied.

Respectfully submitted,

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